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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 TED JENSEN,

10 Plaintiff,

Case No. C11-1380-MJP-JPD

11 v.

REPORT AND RECOMMENDATION

12 CINDY KLINE, *et al.*,

Defendants.

13  
14 INTRODUCTION AND SUMMARY CONCLUSION

15 Plaintiff Ted Jensen is a Washington State prisoner who is currently incarcerated at the  
16 Coyote Ridge Corrections Center (“CRCC”) in Connell, Washington. He brings this civil rights  
17 action under 42 U.S.C. § 1983 to allege violations of his constitutional rights during the course  
18 of his confinement at the Monroe Corrections Center (“MCC”) in 2009. Specifically, plaintiff  
19 alleges that defendants violated his First, Fourth, and Fifth Amendment rights when they  
20 searched his cell at the MCC, Twin Rivers Unit (“TRU”), and confiscated and destroyed his  
21 sacred Native American religious items. Plaintiff identifies as defendants in his complaint two  
22 MCC corrections officers: Cindy Kline and Brian Smith. Plaintiff seeks compensatory  
23 damages.

REPORT AND RECOMMENDATION - 1

1 Defendants have filed a motion for summary judgment which is currently ripe for review.  
2 Plaintiff has filed a responsive brief opposing defendants' motion, and defendants have filed a  
3 reply brief in support of their motion. The Court, having reviewed defendants' motion, the  
4 briefing of the parties, and the balance of the record, concludes that defendants' motion for  
5 summary judgment should be granted and that plaintiff's complaint, and this action, should be  
6 dismissed with prejudice.

### 7 BACKGROUND

8 On September 11, 2009, Corrections Officers Cindy Kline and Brian Smith, the two  
9 defendants in this action, were instructed by their shift lieutenant to conduct a search of  
10 plaintiff's cell. (*See* Dkt. No. 47, Ex. 2 at 2; Dkt. No. 50, Decl. at 3.) According to defendants,  
11 they were directed to pay particular attention to the sacred items box belonging to plaintiff and to  
12 a pipe contained within that box. (*See id.*) Plaintiff's sacred items box was removed from his  
13 cell during the search and was taken to an office so the box itself could be searched. (*Id.*) A  
14 number of additional items belonging to both plaintiff and his cellmate were confiscated during  
15 the search. (*See id.*)

16 A sacred items box is a box in which offenders are permitted to store authorized religious  
17 items. (*See* Dkt. No. 47, Ex. 1, Attach. A at 5.) Only sacred items, as defined by Department of  
18 Corrections ("DOC") policy, may be stored in the box and all sacred items authorized to be  
19 stored therein must be listed on the offender's DOC Religious Program and Property Matrix.  
20 (*Id.*) Religious/sacred items must be requested through, and issued by, the facility chaplain.<sup>1</sup>  
21 (*Id.*, Ex. 1, Attach. A at 3-4.)

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22 <sup>1</sup> DOC Policy 560.210(II)(A)(1) specifically provides that all sacred items must be requested through the  
23 facility chaplain, must be procured through established mail and property procedures, must be issued by the facility  
chaplain and appropriately documented, and must not be altered. (Dkt. No. 47, Ex. 1, Attach. A at 3-4.) The policy

1 DOC policy makes clear that an offender's personal religious items are to be handled  
2 with respect and that items authorized to be stored in an offender's sacred items box are not to be  
3 handled by staff. (Dkt. No. 47, Ex. 1, Attach. B at 4.) When conducting a search of an  
4 offender's sacred items box, staff are permitted to lift the box cover and conduct a visual search  
5 because the box itself is not considered sacred. (*Id.*) If staff determine that a more detailed  
6 search is necessary, DOC policy specifies that the offender should be present during the search  
7 unless staff have reason to believe that there is an immediate threat to facility security, safety or  
8 health. (*See id.*)

9 In instances where a more detailed search is conducted in the presence of the offender,  
10 policy provides that the offender may be directed to empty the contents of the box onto a flat  
11 clean surface and spread the items out, and may be directed to show specific items to staff for  
12 closer inspection. (*See id.*) If an offender refuses to comply with the instructions of staff, the  
13 contents of the box are to be sealed inside the box and later inspected with a chaplain present.  
14 (*Id.*) If contraband or items other than authorized sacred items are discovered in an offender's  
15 sacred items box, policy provides that those items are to be returned to the box and the box is to  
16 be sealed with tape that is signed and dated by the officer conducting the search. (*Id.*, Ex. 1,  
17 Attach. B at 5.) The box is then to be taken to the evidence room and the facility chaplain,  
18 correctional unit supervisor, or shift commander is to review the items and either approve them  
19 or recommend some other action. (*Id.*) Religious items which have not been registered with the  
20 chaplain are treated as contraband. (*Id.*)

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23 also specifically provides that "[n]o religious item made by any offender may be retained in the facility for any purpose." (*See id.*)

1 According to defendants, who have both submitted declarations in support of the pending  
2 summary judgment motion, the search of plaintiff's sacred items box was conducted in  
3 accordance with DOC policy. Apparently determining that a visual search of plaintiff's sacred  
4 items box was not sufficient, defendants instructed plaintiff to empty the contents of his box onto  
5 a desktop which had been cleaned off for that purpose and then to hand his religious property  
6 matrix to defendant Kline so that she could verify the items he was authorized to store in the box.  
7 (Dkt. No. 47, Ex. 2 at 2; Dkt. No. 50, Decl. at 3.) Plaintiff complied with these initial directives.  
8 (*See id.*) Defendant Kline then proceeded to call out the items listed on the matrix and plaintiff  
9 was instructed to find each item and show it to her so that she could visually inspect it. (*Id.*)  
10 After defendant Kline inspected an item, plaintiff was instructed to place the item back in the  
11 box. (*Id.*)

12 According to defendants, plaintiff appeared to get more nervous and more agitated as the  
13 inspection continued. (*Id.*) Defendant Kline had to repeat her instructions to plaintiff several  
14 times during the process and plaintiff became increasingly uncooperative. (*Id.*) Defendant Kline  
15 identified a number of items during the search that were not listed on plaintiff's matrix and were  
16 therefore considered contraband. (Dkt. No. 50, Decl. at 4.) When defendant Kline instructed  
17 plaintiff to place those items back into the box, plaintiff refused to comply and became  
18 particularly disruptive. (*Id.*) At that point, defendant Smith instructed plaintiff to turn around  
19 and prepare to be handcuffed. (Dkt. No. 47, Ex. 2 at 2-3; Dkt. No. 50, Decl. at 4.) Defendant  
20 Kline explained to plaintiff that the items would be put back in the box and would be verified by  
21 the chaplain. (Dkt. No. 50, Decl. at 4.) Defendant Smith then applied restraints and plaintiff was  
22 escorted by officers to a different office with his sacred items box and his contraband items.  
23 (Dkt. No. 47, Ex. 2 at 3; Dkt. No. 50, Decl. at 4.)

1 The MCC chaplain was then contacted and asked to assist with the search. (*Id.*)  
2 According to defendant Kline, she resumed the search with plaintiff, the chaplain, and the shift  
3 commander present. (Dkt. No. 50, Decl. at 4.) Once again, defendant Kline read out the items  
4 listed on plaintiff's religious property matrix and plaintiff then held the item up and placed it  
5 back in the box if the item was indeed on the list. (Dkt. No. 50, Decl. at 5.) Items which were  
6 not on plaintiff's property matrix were placed in a plastic bag. (*Id.*) Defendant Kline states that  
7 the chaplain also verified which items were on the matrix. (*Id.*)

8 Among the items found in plaintiff's sacred items box were three smoking pipes. (*Id.*)  
9 However, only one pipe was listed on the matrix. (*See id.* and Dkt. No. 47, Ex. 1, Attach. D.)  
10 The single authorized pipe was placed back in the box. (Dkt. No. 50, Decl. at 5.) Plaintiff  
11 indicated that he had made the other two pipes in the hobby shop. (*Id.*) One of the unauthorized  
12 pipes was able to be searched as the ends could be pulled off. (Dkt. No. 50, Decl. at 5.)  
13 However, the second pipe had the ends glued on and could not be searched. (*Id.*) The shift  
14 commander, concerned that the pipe could conceal contraband such as a weapon, directed that  
15 the pipe be taken to maintenance to see if the ends could be removed. (*Id.*) Maintenance was  
16 unable to remove an end piece and ultimately, again at the direction of the shift commander,  
17 broke the pipe into two parts so that it could be searched. (*Id.*) According to defendant Kline,  
18 that pipe was the only item damaged during the search. (*Id.*, Decl. at 6.)

19 Also discovered during the search of plaintiff's sacred items box were two 6" sharpened  
20 wooden sticks that, defendant Kline states, had the appearance of homemade shanks. (*Id.*, Decl.  
21 at 5.) When asked about those items, plaintiff indicated that he had also made those in the hobby  
22 shop and he explained that one was a hair tie and the other was a pipe cleaner. (*Id.*) Once the  
23 sharpened sticks were discovered, plaintiff was handcuffed and taken to a holding cell for

1 possessing shanks. (Dkt. No. 50, Decl. at 5.) Defendant Kline states that she thereafter finished  
2 the inventory of the sacred items box with the chaplain. (*Id.*) Following essentially the same  
3 procedure as when plaintiff was present, defendant Kline read off the items that were on the  
4 matrix and the chaplain, instead of plaintiff, inspected each item and placed items which were on  
5 the list back in the box. (*Id.*) Items that were not on the matrix were placed into a plastic bag.  
6 (*Id.*)

7 According to defendant Kline, at the conclusion of the search, plaintiff's allowable sacred  
8 items were placed back into his sacred items box and the box was taped closed. (*Id.*, Decl. at 6.)  
9 The remaining contraband items were placed into a plastic bag with a copy of the inventory, and  
10 the box and bag were then given to the MCC chaplain. (*Id.*) The sharpened wooden sticks were  
11 placed into evidence and plaintiff was written a serious infraction for possessing those items.  
12 (*Id.*)

13 Plaintiff was subsequently transferred out of MCC to his current place of incarceration.  
14 Plaintiff indicates that once he arrived at CRCC, he informed the facility chaplain about the  
15 actions of defendants and his concern about his sacred items box. (*See* Dkt. No. 55 at 14.) The  
16 CRCC chaplain thereafter contacted the MCC chaplain who, according to plaintiff, related that  
17 he had no knowledge of the box and that it was not in his possession. (*Id.*) The box was  
18 subsequently located at MCC and was sent to plaintiff at CRCC. (*Id.*)

19 According to plaintiff, when the box was received at CRCC it was still sealed with tape  
20 that had been signed by defendant Kline and was dated September 11, 2009. (*Id.*) The CRCC  
21 chaplain broke the seal and opened the box. (*Id.*) Plaintiff claims that when the box was opened  
22 he discovered bags containing the broken pipe, feathers that had been stripped from their quills,  
23 and assorted herbs that had been mixed together and rendered unusable. (Dkt. No. 55 at 14-15.)

1 Plaintiff maintains that the search of his sacred items box was not conducted in accordance with  
2 policy and that all of his confiscated items were listed, per DOC policy, on his religious property  
3 matrix which was signed and authorized by the MCC chaplain.

#### 4 DISCUSSION

5 Plaintiff asserts that defendants' actions resulted in the intentional desecration and loss of  
6 his religious property in violation of his rights under the First, Fourth, and Fifth Amendments to  
7 the United States Constitution. Defendants argue in their motion for summary judgment that  
8 each of plaintiff's claims must be dismissed. Defendants argue, in the alternative, that they are  
9 entitled to qualified immunity. Because this Court concludes that plaintiff has not established  
10 any violation of his federal constitutional rights, it does not reach defendants' qualified immunity  
11 argument.

#### 12 Summary Judgment Standard

13 Summary judgment is proper only where "the pleadings, depositions, answers to  
14 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
15 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
16 of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the absence of a  
17 genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257  
18 (1986). Genuine disputes are those for which the evidence is such that a "reasonable jury could  
19 return a verdict for the nonmoving party." *Id.* Material facts are those which might affect the  
20 outcome of the suit under governing law. *Id.*

21 In response to a properly supported summary judgment motion, the nonmoving party  
22 may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts  
23 demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the

1 existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of  
2 evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on a  
3 motion for summary judgment, the court is required to draw all inferences in a light most  
4 favorable to the nonmoving party. *Id.* at 248. The court may not weigh the evidence or make  
5 credibility determinations. *Id.*

#### 6 Section 1983 Standard

7 In order to sustain a cause of action under 42 U.S.C. §1983, a plaintiff must show (i) that  
8 he suffered a violation of rights protected by the Constitution or created by federal statute, and  
9 (ii) that the violation was proximately caused by a person acting under color of state law. *See*  
10 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9<sup>th</sup> Cir. 1991). The causation requirement of § 1983 is  
11 satisfied only if a plaintiff demonstrates that a defendant did an affirmative act, participated in  
12 another's affirmative act, or omitted to perform an act which he was legally required to do that  
13 caused the deprivation complained of. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir. 1981)  
14 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9<sup>th</sup> Cir. 1978)).

#### 15 First Amendment: Free Exercise of Religion

16 Plaintiff asserts that defendants violated his First Amendment rights when they searched,  
17 confiscated, and destroyed his sacred religious items. The First Amendment guarantees the right  
18 to the free exercise of religion. The Supreme Court has made clear that inmates retain the  
19 protections afforded by the First Amendment, “including its directive that no law shall prohibit  
20 the free exercise of religion. *O’Lone v. Shabazz*, 482 U.S. 342, 348 (1987). However, the free  
21 exercise right “is necessarily limited by the fact of incarceration, and may be curtailed in order to  
22 achieve legitimate correctional goals or to maintain prison security.” *McElyea v. Babbitt*, 833  
23 F.2d 196, 197 (9<sup>th</sup> Cir. 1987) (citing *O’Lone*, 482 U.S. at 348).



1 “When a prison regulation impinges on inmates' constitutional rights, the regulation is  
2 valid if it is reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S.  
3 78, 89 (1987)). In *Turner*, the Supreme Court identified four factors that must be considered  
4 when determining whether a prison regulation that impinges on inmates’ constitutional rights is  
5 reasonably related to legitimate penological interests: First, there must be “‘a valid, rational  
6 connection’ between the prison regulation and the legitimate governmental interest put forward  
7 to justify it.” Second, whether there are “alternate means of exercising the right that remain open  
8 to prison inmates” must be assessed. Third, “the impact accommodation of the asserted  
9 constitutional right will have on guards and other inmates, and on the allocation of prison  
10 resources generally” must be determined. Fourth, “the absence of ready alternatives” to the  
11 regulation must be explored. The “existence of obvious, easy alternatives may be evidence that  
12 the regulation is not reasonable.” *Ward v. Walsh*, 1 F.3d 873, 876 (9<sup>th</sup> Cir. 1993) (quoting  
13 *Turner*, 482 U.S. at 89 (citations omitted)).

14 The Supreme Court has made clear that a reviewing court “must accord substantial  
15 deference to the professional judgment of prison administrators, who bear a significant  
16 responsibility for defining the legitimate goals of a corrections system and for determining the  
17 most appropriate means to accomplish them.” *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).  
18 The Supreme Court has also made clear that the burden is not on the state to provide the validity  
19 of a challenged regulation, but is instead on the inmate to disprove it. *Id.*

20 In this case, plaintiff does not appear to challenge the DOC policies that define what  
21 religious items may be possessed nor does he appear to challenge the policies that describe how  
22 sacred/religious items are to be obtained and documented and the manner in which such items  
23

1 are to be searched.<sup>2</sup> Plaintiff, instead, appears to complain that defendants did not comply with  
2 the applicable policies in that they mishandled items during the search and confiscated and  
3 destroyed items which he was authorized to possess and thereby interfered with his right to  
4 practice his religion.

5 In his response to defendants' motion for summary judgment, plaintiff places particular  
6 emphasis on the pipe which was broken in two to permit it to be searched. Plaintiff contends that  
7 the pipe "was reverently and ritually wrapped inside of hide coverings with sacred herbs attached  
8 to the exterior of the carrying pouches, setting it out as not just a wooden stick and indeed a  
9 ceremonial object the owner placed great veneration and worship upon." (Dkt. No. 55 at 9.)  
10 Accepting as true plaintiff's assertion that he viewed the destroyed pipe as sacred, plaintiff offers  
11 no evidence to rebut the evidence presented by defendants that that particular pipe was not the  
12 one he was authorized to possess. And, plaintiff does not appear to dispute that only two of three  
13 pipes were seized and that one, therefore, remained in his sacred items box. Plaintiff fails to  
14 demonstrate that the destruction of the single pipe in any way prevented him from practicing his  
15 religion.

16 Moreover, the record demonstrates that the destruction of the pipe at issue was justified  
17 in light of the legitimate security concern that the glued pipe might contain a weapon and that  
18 breaking the pipe open was the only way to effectively search it. Finally, plaintiff offers no  
19 evidence that the named defendants were the individuals responsible for the destruction of the  
20 pipe or the ultimate disposition of any of the other items confiscated from plaintiff's sacred items  
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22 <sup>2</sup> While plaintiff does not appear to challenge the validity of the policies, this Court notes that such a  
23 challenge would, in any event, fail because the policies at issue, when considered in light of the *Turner* factors, are  
constitutionally valid because they are reasonably related to the legitimate penological interest of ensuring the safety  
and security of DOC facilities.

box. It appears clear from the declarations of defendants that their role was limited to searching plaintiff's religious property and seizing unauthorized items. Plaintiff offers no evidence to the contrary. Plaintiff fails to establish that either of the named defendants engaged in any conduct with interfered with plaintiff's right to practice his religion. Accordingly, defendants are entitled to summary judgment with respect to plaintiff's First Amendment claim.

#### Fourth Amendment: Unreasonable Search and Seizure

Plaintiff asserts that the search of his cell on September 11, 2009, and the confiscation of certain items of his personal property, violated his rights under the Fourth Amendment. It is well established that a convicted prisoner does not forfeit all constitutional protections as a result of his confinement. *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988)(citing *Bell v. Wolfish*, 441 U.S. 520 (1979)). However, those rights may, of necessity, be restricted in the prison context. *Hudson v. Palmer*, 468 U.S. 517 (1984). The Supreme Court made clear in *Hudson* that the Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell. *Id.* at 526. Likewise, the Fourth Amendment "does not protect an inmate from the seizure and destruction of his property." *Taylor v. Knapp*, 871 F.2d 803, 806 (9<sup>th</sup> Cir. 1989) (citing *Hudson*, 468 U.S. at 528 n. 8). As the facts alleged by plaintiff clearly do not implicate Fourth Amendment concerns, defendants are entitled to summary judgment with respect to that claim.

#### Fourteenth Amendment: Due Process<sup>3</sup>

Plaintiff appears to allege that his due process rights were violated by the seizure and destruction of his personal property. Such an allegation is not sufficient to state a claim for relief

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<sup>3</sup> While plaintiff identifies his due process claim as one arising under the Fifth Amendment, this case does not involve federal actors and, thus, this Court analyzes the claim under the 14<sup>th</sup> Amendment.

1 under § 1983. The Due Process Clause provides that no person shall be deprived of “life, liberty,  
2 or property, without due process of law.” U.S. Const. Amend. V. However, where a state  
3 employee's random, unauthorized act deprives an individual of property, either negligently or  
4 intentionally, the individual is relegated to his state post-deprivation process, so long as the state  
5 provides an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984);  
6 *Parratt v. Taylor*, 451 U.S. 527, 540-41 (1981), *overruled on other grounds by Daniels v.*  
7 *Williams*, 474 U.S. 327 (1986).

8 Washington State provides a post-deprivation remedy for the alleged tortious conduct of  
9 state employees under RCW 4.92. Plaintiff does not allege any due process inadequacy in the  
10 tort remedy provided under RCW 4.92 and, thus, plaintiff has not alleged a viable due process  
11 claim with respect to the loss of any personal property. Accordingly, defendants are entitled to  
12 summary judgment with respect to plaintiff's due process claim as well.

### 13 CONCLUSION

14 For the reasons set forth above, this Court recommends that defendants' motion for  
15 summary judgment be granted and that plaintiff's complaint, and this action, be dismissed with  
16 prejudice. A proposed Order accompanies this Report and Recommendation.

17 DATED this 14th day of September, 2012.

18   
19 JAMES P. DONOHUE  
20 United States Magistrate Judge  
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23